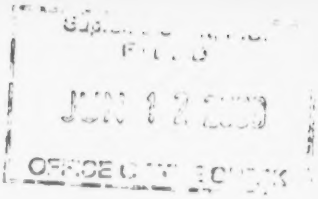

No. 08-1144

In the Supreme Court of the United States

J.L. SPOONS, Inc.,

Petitioner,

v.

HENRY GUZMAN, DIRECTOR,
OHIO DEPARTMENT OF PUBLIC SAFETY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD CORDRAY
Ohio Attorney General

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY
Deputy Solicitor
ELISE PORTER
Assistant Solicitor
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.mizer
@ohioattorneygeneral.gov

Counsel for Respondents

QUESTION PRESENTED

Do Ohio Liquor Rule 52's restrictions on nudity and sexual contact at liquor-serving establishments survive an overbreadth challenge because they do not reach a substantial amount of protected speech in relation to their plainly legitimate sweep?

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INTRODUCTION

At issue in this case is the type of reasonable regulation of nude dancing that this Court and others have repeatedly upheld. Ohio's Liquor Rule 52 ("Rule 52") restricts nudity and sexual activity in liquor-serving establishments. The Sixth Circuit properly found that Rule 52 is not unconstitutionally overbroad, thus rejecting a challenge by a group of strip-club owners led by Petitioner J.L. Spoons, Inc. ("Spoons"). Spoons now insists that the decision creates a circuit split and raises other issues worthy of this Court's review. Spoons is wrong, however, in large part because it mischaracterizes the scope of Rule 52.

Rule 52's nudity definition tracks virtually verbatim the anti-nudity provisions upheld in *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991), and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 284 (2000). And its definition of restricted sexual activity includes actual sex as well as "sexual contact," which includes "touching of an erogenous zone of another . . . for the purpose of sexually arousing or gratifying either person." Thus, Rule 52 does not prohibit any touching between two people that might arouse a third-party *observer*. Rule 52 restricts so-called "lap dances" in which a nude dancer touches a customer to gratify him—which is not protected First Amendment activity—but it does not restrict a ballet performance in which one dancer lifts another by the buttocks, because such "touching of an erogenous zone" is not "for the purposes of sexually arousing" either dancer.

Measured by a proper understanding of Rule 52's scope, then, Spoons's claims of conflict do not hold up. For example, Spoons claims that the Sixth

Circuit's decision below conflicts with an Eighth Circuit decision invalidating a law that prohibited certain contact "when such contact can reasonably be construed as being for the purpose of the sexual arousal or gratification of either party *or any observer*." *Ways v. City of Lincoln*, 274 F.3d 514, 516 (8th Cir. 2001) (emphasis added). The Eighth Circuit specifically found the "observer" language to be the problem "because constitutionally protected artistic expression may legitimately intend to titillate or arouse members of the audience." *Id.* at 520. That difference distinguishes this case not only from *Ways*, but also from every other case to which Spoons points. Nor is any purported conflict *within* the Sixth Circuit a cause for review.

The Sixth Circuit's overbreadth analysis here is fully consistent with this Court's First Amendment jurisprudence. As the appeals court correctly held, the "sexual contact" provision is not overbroad, because Ohioans may continue to enjoy ballet, ice skating, and performances of "high culture" works with sexual content, even in venues that sell alcoholic beverages. Further, Rule 52 does not affect full nudity or sexual contact at venues that do not serve liquor. Thus, the potential for affecting *any* protected expression is small, and it comes nowhere near a *substantial* amount, measured against the law's legitimate sweep—namely, restricting the nudity and sexual contact that occurs at strip clubs, not at the ballet.

Moreover, while the Sixth Circuit's general overbreadth approach is consistent with this Court's, the decision below is apparently the only one to consider overbreadth in the specific context of a law

with Rule 52's narrow focus. So even if there might be a need someday to consider how overbreadth applies to such laws, consideration should await further percolation in the lower courts.

Finally, Spoons mistakenly insists that review is needed so that Spoons can obtain, on remand, review of its as-applied claim. But such review on remand is already available, because the district court never reached that issue (nor, consequently, did the Sixth Circuit).

The Court accordingly should deny the Petition.

STATEMENT OF THE CASE AND FACTS

A. The Ohio Liquor Commission promulgated Rule 52 to help control the secondary effects of nudity and sexual activity in liquor-serving establishments.

The Ohio Liquor Commission promulgated the latest version of Ohio Administrative Code 4301:1-1-52, known as "Rule 52," to combat the undesirable secondary effects resulting from nudity and sexual activity at liquor establishments. Before promulgating the current version of the rule, the Commission first conducted a detailed review and analysis of studies and cases regarding nudity and sexual activity in places with a liquor license. They also considered testimonials from individuals with expertise in the area and experience in strip clubs and similar businesses. The Commission concluded that establishments with a liquor permit that also allow nudity and sexual activity are susceptible to undesirable secondary effects.

The Commission also conducted a public hearing on the subject of secondary effects as part of the rule-promulgation process under Ohio law. At this hearing, the Commissioners heard additional evidence regarding potentially undesirable secondary effects of nudity and sexual activity in liquor establishments. For example, among those testifying was Bruce A. Taylor, an attorney from Fairfax, Virginia, with experience in prosecuting vice crimes, including obscenity, prostitution, and liquor violations. *J.L. Spoons, Inc. v. Morckel*, 314 F. Supp. 2d 746, 749. Taylor stated that "nude dancing does contribute to its own type of secondary effects and to

a greater degree than other liquor bars that don't have nude dancing." *Id.*

Rule 52 generally provides that an establishment holding a liquor permit may not knowingly or willfully allow "nudity" or "sexual activity" on the premises:

> no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to . . .
>
> (2) Appear in a state of nudity;
>
> (3) Engage in sexual activity, as said term is defined in Chapter 2907 of the Revised Code.

Ohio Admin. Code § 4301:1-1-52 (B)(2) & (3) (2004).

"Nudity" is defined in section (A)(2), in language virtually identical to that analyzed by the Court in *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991), and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 284 (2000). In full, the section defines nudity as:

> The showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast,

> which device simulates and gives the realistic appearance of the nipples and/or areola.

Ohio Admin. Code § 4301:1-1-52 (A)(2)(2004). This nudity definition is identical to the one upheld in *City of Erie*, except that it adds the words "and/or areola." Thus, Rule 52 bans, in liquor permit premises, nudity under the definition in *Barnes* and *City of Erie*.

Ohio law defines "sexual activity" as "sexual conduct or sexual contact, or both." Ohio Rev. Code § 2907.01(C) (2006). "Sexual conduct" is defined as intercourse or other actual sex acts. Ohio Rev. Code § 2907.01(A).

"Sexual contact" is defined as touching certain body parts for the purpose of sexual arousal or gratification of one of the individuals engaged in the touching:

> any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

Ohio Rev. Code § 2907.01(B). Thus, Rule 52 bans, on liquor permit premises, touching for the purpose of arousing or gratifying a party to the activity, but does not prohibit touching for the purpose of the arousal or gratification of an observer, or for any other purpose.

If a permit holder violates Rule 52, possible penalties include a fine against the liquor permit

holder or a revocation of the liquor permit. Violations of Rule 52 do not trigger any criminal penalties.

B. The district court invalidated Rule 52 as unconstitutionally overbroad under the First Amendment, but the Sixth Circuit reversed.

Three days before Rule 52 was scheduled to go into effect, Petitioners J.L. Spoons, Inc., et al., owners of "adult" clubs that feature nude or nearly nude dancers, sought declaratory and injunctive relief against the rule. Spoons argued that Rule 52 significantly burdens rights under the First and Fourteenth Amendments of the United States Constitution, both facially (as impermissibly overbroad) and as applied to its establishment.

At the hearings before the district court for the preliminary and permanent injunctions, Ohio offered testimony about its knowledge and experience dealing with the undesirable secondary effects associated with nudity and sexual activity at liquor establishments and supporting its basis for promulgating Rule 52.

The District Court granted Spoons's motion for preliminary and permanent injunctions of the nudity and sexual activity sections of Rule 52 and declared them unconstitutionally overbroad. See *J.L. Spoons, Inc. v. Morckel*, 2007 U.S. Dist. Lexis 74, *2 (N.D. Ohio 2007). The District Court did not rule on Spoons's as-applied challenge.

On appeal, the Sixth Circuit reversed, holding that Rule 52 is not overbroad. Pet. App. 2. The Sixth Circuit declined Spoons's petition for rehearing

and suggestion of rehearing *en banc*. Pet. App. at 720.

REASONS FOR DENYING THE WRIT

Spoons presents no issue worthy of review. Spoons's claims, both as to the need for review and the underlying merits of its claims, are based on misperception of both the Court's overbreadth jurisprudence and the narrow focus of Ohio's Liquor Rule 52.

First, the asserted conflicts between the circuits and within the Sixth Circuit do not exist, because the laws analyzed in the other cases all involve much broader prohibitions on nudity or sexual activity. As the Sixth Circuit recognized below, these other laws are a far cry from the closely-focused Rule 52.

Second, the Sixth Circuit's overbreadth analysis tracks the Court's teachings and does not call for review. While the Court may not have analyzed the nudity provisions in *City of Erie* and *Barnes* under the overbreadth doctrine, the Court's general overbreadth jurisprudence provides the courts—including the Sixth Circuit here—with ample guidance to evaluate Rule 52 and similar laws. Moreover, because only the Sixth Circuit has reviewed a law as narrow as Rule 52, the Court should await percolation of the issue in similar cases to see if review is ever warranted.

Finally, Spoons's request for certiorari to ensure consideration of its as-applied challenge is unnecessary. The district court did not resolve the as-applied challenge, and nothing in the Sixth Circuit's opinion eliminated it. The challenge

accordingly appears to remain live in the district court.

A. No division of authority exists among or within the circuits, because the alleged conflict cases involve laws broader than Ohio's narrowly focused Rule 52.

Spoons asserts that the Sixth Circuit's decision here conflicts both with cases from other circuit courts of appeals and with its own cases. But Spoons is wrong on both counts.

1. The alleged circuit split is illusory.

Spoons cites a handful of circuit cases that allegedly show that other circuits invalidate laws similar to Ohio's Rule 52. See Pet. at 17-21. But each of those cases involved much broader laws that restricted wide swaths of conduct protected by the First Amendment. Ohio's Rule 52, by contrast, narrowly restricts only conduct that gives rise to adverse secondary effects. The rule therefore has minimal, if any, effect on legitimate expression, and the Sixth Circuit's decision upholding the narrow provision is consistent with decisions invalidating much broader laws.

Perhaps the best example of the illusory nature of the claimed split is Spoons's reliance on *Ways v. City of Lincoln*, 274 F.3d 514 (8th Cir. 2001), as the broader nature of the law at issue there—and the court's reliance on the language distinguishing it from Rule 52—are indisputable. See Pet. at 21. Rule 52 defines sexual contact as "touching of an erogenous zone of another . . . for the purpose of sexually arousing or gratifying *either person*." (emphasis added.) The ordinance in *Ways*, by

contrast, defined sexual contact to include both kissing and touching of various body parts "whether covered or not . . . when such contact can reasonably be construed as being for the purpose of the sexual arousal or gratification of either party *or any observer*." *Id.* at 516 (emphasis added).

That last clause, barring contact that gratifies an observer even where neither touching party is so gratified, was the source of the problem for the Eighth Circuit. That court noted, "constitutionally protected artistic expression may legitimately intend to titillate or arouse members of the audience." *Id.* at 520. The court reasoned that audience members might find all sorts of performance gratifying, such that the law could reach ballet and ice skating performances. The law at issue was overbroad because it reached those forms of communication. Rule 52's "sexual contact" definitions, by contrast, cannot possibly reach such ballet performances, because the touching that occurs in those performances is not for the "purpose of the sexual arousal or gratification of either party." The rule therefore leaves intact any protected artistic expression intended to titillate or arouse *members of the audience*.

The Eighth Circuit in *Ways* also found problematic a provision that barred "simulated sex," and Ohio's Rule 52 has no analogous provision. The Eighth Circuit found that this provision "could have been enforced to prohibit the type of simulated sex to be found in productions of *Hair*" or in any artistic expression that involves "simulated sex." In sum, *Ways* does not conflict with *Spoons*.

Nor does the decision below conflict with the Third Circuit's decision in *Conchatta v. Miller,* which addressed a law banning "lewd, immoral, or improper entertainment." 458 F.3d 258, 261 (3d Cir. 2006); see Pet. at 18-19. That law, too, was far broader than Rule 52. As the *Conchatta* Court stated, the Pennsylvania law "has not been limited to proscribe *only* entertainment" that involves a narrow range of non-protected exposure or touching. *Id.* at 266. Thus, *Conchatta* cannot be considered "in conflict" with this case, because Rule 52 *has* been limited to proscribe *only* nudity as defined in *City of Erie* and *Barnes* and *only* activity that involves an actual sex act or sexual touching that gratifies one of the parties to the contact.

Spoons is equally mistaken in asserting a conflict between the decision below and the Fourth Circuit's decision in *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002) (*Carandola I*). See Pet. at 19-20. The North Carolina law at issue there was not only broader than Rule 52, but was even broader in its sweep than the laws in *Conchatta* and *Ways*. The *Carandola I* law prohibited, without limitation, "any entertainment that includes or simulates sexual intercourse or any other sexual act," and "the touching, caressing or fondling of [various body parts]." *Id.* at 510. The court found that the broad limits on "touching" certain body parts, with no definitional restriction to touching for the gratification of anyone, performer or observer, left vulnerable "a ballet in which one dancer touches another's buttock during a lift." *Id.* at 516. The law in *Carandola I* also barred both "simulated sex" and "simulated nudity" under definitions that easily covered wide ranges of legitimate artistic endeavor.

Notably, North Carolina later amended the law invalidated in *Carandola I*, and the updated law was *upheld* by the Fourth Circuit, showing agreement between the Fourth and Sixth Circuits that a properly focused law in this area is not overbroad. See *Giovani Carandola, Ltd. v. Fox*; 470 F.3d 1074 (4th Cir. 2006) (*Carandola II*). In *Carandola II*, the Fourth Circuit noted that the "sexual contact" definition no longer covered "touching, caressing, or fondling," but was limited to "fondling," which the court read to "only bar[] a performer from actually manipulating specified erogenous zones." *Id.* at 1083 (internal quotation omitted). The court also noted that the amended law exempted performances in specified venues, such as "theaters, concert halls, art centers, museums, or similar establishments," when the performances presented in such venues are "expressing matters of serious literary, artistic, scientific, or political value." *Id.* at 1084.

While Ohio's Rule 52 does not express its limits in the same venue-based and artistic-value way that North Carolina uses, Ohio's restriction of the sexual-contact definition to touching "for the sexual arousal or gratification of either person" serves much the same function. After all, a ballet dancer does not seek to sexually arouse the other dancers he or she lifts, and so on. Thus, the Sixth Circuit's upholding of Rule 52 is consistent with the Fourth Circuit's invalidation of the broader law in *Carandola I*, and with its later validation of the narrower law in *Carandola II*.

Finally, Spoons is mistaken in claiming that the decision below "cannot be harmonized" with cases that upheld similar ordinances against overbreadth

challenges on the ground that those ordinances "confined [their] reach to adult entertainment establishments." See Pet. at 21, n. 8 (citing *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000); *J&B Entm't, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *Carandola II*, 470 F.3d at 1079). True, those cases said that such limits prevented overbreadth problems, but those cases never said that such a limit was the *only* way to prevent overbreadth. Therefore no conflict arises. And as noted above, the other limits in Rule 52 essentially serve the same function, so Rule 52 does *not* restrict ballets or other performances based on contact between performers that does not sexually arouse or gratify the performers.

In sum, Spoons fails to show a real conflict between the decision below and any decision from another circuit.

2. The alleged intra-circuit dispute is also illusory and would not warrant review if it existed.

Spoons also argues that review is needed to correct conflicts within the Sixth Circuit's own precedent, but that claim lacks merit for several reasons. First, this Court has never indicated that conflict *within* a circuit justifies a grant of certiorari. Rather, resolution of conflict within a circuit "is the dominant concern" of the en banc process. *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring). Spoons sought en banc review, but the Sixth Circuit declined. This Court need not second-guess the Circuit's assessment of the alleged intra-circuit conflict.

Second, even if an intra-circuit split were worthy of this Court's attention, the alleged split here is illusory. As with the alleged circuit split, the cited Sixth Circuit cases deal with laws that broadly prohibited nudity and sexual conduct, in contrast to Rule 52's narrowly focused regulations.

For example, in *Triplett Grille v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), the ordinance at issue prohibited *all* nudity "in a public place," not just at liquor-serving establishments. *Id.* at 131 n.2. Equally important, the *Triplett Grille* court found that the ordinance at issue made "no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions." *Id.* at 136. Indeed, the ordinance was admittedly enacted because of moral outrage, rather than to control secondary effects.

Furthermore, *Triplett Grille*, like *Ways* and *Carandola I*, is analytically distinct because the panel there addressed overbreadth before *Virginia v. Hicks*, 539 U.S. 113 (2003). The court below also distinguished *Triplett Grille* based on its reliance on the concurrence by Justice Souter in *Barnes*, since placed in question by *City of Erie*. *Spoons*, 538 F.3d at 385-86.

The other cited Sixth Circuit cases are similarly distinguishable. The law at issue in *Odle v. Decatur County, Tenn.*, 421 F.3d 386 (6th Cir. 2005) prohibited not only nudity, but also "the performance of a wide range of arguably sexually suggestive acts," 421 F.3d at 392, including "simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or [other] sexual acts," *id.* at 394 (emphasis added). By contrast, Rule 52 does not

prohibit simulated acts. And *Hamilton's Bogarts v. Michigan*, 501 F.3d 644 (6th Cir. 2007), like *Odle*, addressed a law banning simulated sexual acts. *Spoons*, 538 F.3d at 386; *Hamilton's Bogarts*, 501 F.3d at 648-49. *Hamilton's Bogarts* offered only dicta on overbreadth, indicating that the overbreadth claim "appear[ed] to" be strong. *Id.* at 654.

In short, Spoons has not shown a genuine conflict among the circuits or within the Sixth Circuit with respect to a narrowly focused law similar to Rule 52. The Court should not grant certiorari on the grounds of inter- or intra-circuit conflict.

B. Review is not needed to apply overbreadth doctrine to laws upheld against different challenges in *Barnes* and *City of Erie*.

All agree that Rule 52 copied, nearly verbatim, the nudity definitions from the ordinances upheld against as-applied challenges in *Barnes* and *City of Erie*. And all agree that those as-applied decisions do not preclude Spoons or any other party from attacking Rule 52 or similar nudity restrictions under the alternate theory of an overbreadth claim. Spoons accordingly urges the Court to grant its Petition to complement *Barnes* and *City of Erie* by applying overbreadth to such laws. But no such complementary assessment is needed—not because *Barnes* and *City of Erie* have answered the question (they did not), but because the Court's general overbreadth law provides ample guidance. And even if it did not, this case does not justify a new look.

This Court recently clarified when a law's overbreadth is substantial enough to warrant facial

invalidity. In *Virginia v. Hicks*, 539 U.S. 113, 122 (2003), the Court reiterated that the overbreadth claimant bears the burden of demonstrating that the law, taken as a whole, is substantially overbroad, judged in relation to its plainly legitimate sweep. Other recent cases provide guidance for applying the same overbreadth rule in various contexts. *United States v. Williams*, 128 S. Ct. 1830 (2008) (statute criminalizing sale of child pornography not overbroad); *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1195 (2008) (ballot language law not overbroad); *McConnell v. FEC*, 540 U.S. 93, 206 (2003) (campaign finance law not facially overbroad).

The circuits have recognized the importance of *Hicks* and other recent cases and have, for the most part, correctly navigated the overbreadth doctrine in analyzing a wide range of laws and fact situations. See, e.g., *United States v. Schales*, 546 F.3d 965 (9th Cir. 2008) (federal laws regarding child exploitation and pornography not overbroad), cert. denied, 129 S. Ct. 1397 (Feb. 23, 2009); *United States v. Calimlim*, 538 F.3d 706, 713 (7th Cir. 2008) (forced labor law not overbroad), cert. denied, 129 S. Ct. 935 (2009); *Fla. Ass'n of Prof'l Lobbyists Inc. v. Div. of Legislative Info. Servs.*, 525 F.3d 1073, 1079 (11th Cir. 2008) (Florida lobbying law not overbroad); *Preminger v. Sec'y of Veterans' Admin.*, 517 F.3d 1299, 1318 (Fed. Cir. 2008) (law prohibiting demonstrations on VA property not overbroad); *Conchatta*, 458 F.3d 258 (3d Cir.); *Faustin v. City and County of Denver*, 423 F.3d 1192 (10th Cir. 2005) (Denver ordinance prohibiting signs on highway overpasses not overbroad); *Brazos Valley Coal. for Life, Inc. v. City of Bryan Texas*, 421 F.3d 314 (5th Cir. 2005) (Texas city sign ordinance

not overbroad); *Initiative and Referendum Inst. v. United States Postal Serv.*, 417 F.3d 1299 (D.C. Cir. 2005) (regulation preventing speech activities outside post office overbroad); *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (federal law prohibiting material support to terrorists not overbroad); *United States v. Nenninger*, 351 F.3d 340 (8th Cir. 2003) (National Forest Service permit requirement not overbroad).

For its part, the Sixth Circuit has faithfully and properly applied the overbreadth doctrine in several recent decisions, including the decision below. See, e.g., *Connection Distrib. v. Holder*, 557 F.3d 321 (6th Cir. 2009) (en banc) (Child Protection and Obscenity Enforcement Act is not overbroad), petition for cert. pending, No. 08-1449 (filed May 20, 2009); *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008) (Ohio funeral-procession law not overbroad, citing *Hicks*); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005) (Kentucky school dress code not overbroad, citing *Hicks*). In this case, the Sixth Circuit specifically analyzed both the anti-nudity and the sexual conduct provisions of Rule 52 under *Hicks*. The court correctly recognized that the sexual conduct provision of Rule 52 is not overbroad because it has no application in "high culture" venues, as the prohibited touching "does not apply to contact done in furtherance of legitimate works of art for the purpose of conveying artistic meaning." Pet. App. at 10. And the court further found that the hypothetical "high culture" applications of Rule 52's anti-nudity provision do not constitute *substantial* overbreadth. *Id.*

The Sixth Circuit's overbreadth analysis was also correct—and Spoons and the dissent below are wrong—in assessing the number of non-"adult" Ohio venues that Rule 52 could affect. The dissenting judge and Spoons speculate, without concrete evidence, that 12,000-12,300 non-adult venues in Ohio would be "subject to" or "affected by" Rule 52. Pet. App. at 16-17 (Cole, J., dissenting); Pet. at 2, 10-11. Including in this estimated number, however, are countless venues—Progressive Field (née Jacobs Field), the Beachland Ballroom, and the Great Lakes Science Center, to name just three—that are unlikely, to say the least, to present live performances featuring nudity. See Pet. at 10-11; Pet. App. at 17. Instead, the real number of "high culture" venues in Ohio that might present live performances involving nudity is likely a tiny fraction of Spoons's asserted number.[1]

More to the point, Spoons and the dissent consider the wrong variable in the overbreadth analysis. Under the substantiality requirement, the relevant consideration is the universe of the law's *applications*, not of *venues*. In other words, courts must "compar[e] the number of valid applications to the likelihood and frequency of impermissible applications," *Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 228 (3d Cir. 2004). As the Sixth Circuit itself recently noted, "[s]ubstantial overbreadth involves not just an inquiry into the

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[1] Spoons also exaggerates, without support, the application of a prior version of Rule 52 to high culture. The Commission's executive director testified that he "understood that there was a citation against the production *O! Calcutta* back in the 1980s sometime," Pet. at 11, but he apparently had no personal knowledge of this citation.

legitimate and illegitimate sweep of a statute; it also involves an inquiry into the 'absolute' nature of a law's suppression of speech." *Connection Distrib. Co.*, 557 F.3d at 340. In other words, a court should not look to venues where a certain type of speech might occur, but to the absolute amount of speech that is in danger of being suppressed.

Here, the permissible applications of Rule 52's anti-nudity provision overwhelm any arguably impermissible applications. The denominator here is large: Adult establishments feature nude performances on virtually every night of the year. The numerator, by contrast, is small: High-culture venues might host performances that contain nudity—such as the play *Equus*—for a week or two every five or ten years. These hypothetically impermissible applications of Rule 52 are too few and far between to constitute substantial overbreadth. Any "high culture" disputes under Rule 52, if they ever arise, should be resolved through concrete, as-applied challenges.

In short, the Sixth Circuit correctly analyzed both of Rule 52's provisions under the Court's jurisprudence, and the circuits have sufficient guidance from the Court on overbreadth analysis in a wide variety of contexts. The Court need not take this case simply because it did not analyze the anti-nudity laws in *City of Erie* and *Barnes* under the overbreadth doctrine.

Moreover, the Court should refrain from review of Rule 52's sexual conduct provision under the overbreadth doctrine until the lower courts have had more time to analyze similar laws. No other law analyzed by any of the circuits has the same limiting

provisions as Rule 52, that is, a law that prohibits sexual contact only when conducted for the gratification of *parties* to the contact, as opposed to an *observer*. The uniqueness of Rule 52's sexual conduct provision would make this a case of first impression, and the Court should therefore refrain from review at this time.

C. The Court should not grant certiorari to "revive" Spoons's as-applied challenge for remand, because that challenge remains alive—even if doomed by *Erie*—in the district court.

Spoons curiously insists that the Court needs to grant review so that it may revive its alternate as-applied challenge, whether in this Court or on remand in the district court. But that challenge seems to be alive and well, and Spoons points to no evidence that the Sixth Circuit cut it off.

Although the Sixth Circuit did not expressly include remand language noting the issue, no such express reservation was required. The district court enjoined Rule 52 based solely on the overbreadth challenge. Pet. App. at 53. As a result, the Sixth Circuit had before it only the overbreadth claim, on which it reversed. Such an unadorned reversal, with no comment either way as to the remaining, unadjudicated claims, by its nature returns the case to the district court to resume where it left off. Put another way, the Sixth Circuit did not instruct the district court to enter judgment for Ohio; it simply reversed an injunction.

Consequently, the as-applied claim is alive, if Spoons wishes to revive it. To be sure, it may be

uphill sledding, in light of *City of Erie* and Ohio's use of near-identical language. But procedurally, Spoons is free to try, and that is enough to rule this item out as a basis for this Court's review.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY
Deputy Solicitor
ELISE PORTER
Assistant Solicitor
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.mizer
@ohioattorneygeneral.gov

Counsel for Respondents

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